BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

The decision and decree of the Surrogate having been rendered on issues not within and not responsive to the pleadings before that Court and not litigated and having been made without any pleadings upon which to base them and upon pleadings in an action pending in the New York Supreme Court without jurisdiction, are void under the due process provision of the United States Constitution.

Cole v. Armour Fertilizer Works, 237 U. S. 413, 419, 426.
Reynolds v. Stockton, 140 U. S. 254, 264, 265, 268.
Windsor v. McVeigh, 93 U. S. 274, 282.
Standard Oil Company v. Missouri, 224 U. S. 270, 281-282.
Brinckerhoff-Faris Co. v. Hill, 281 U. S. 673, 678-680.
U. S. v. Goldstein, 271 Fed. 838, 845.
In re Conservative Mortgage & Guaranty Co., 24 Fed. (2) 38, 41.

The basic claim made by the petitioners, Helen Van Zile Anthony and her assignee, William D. Smith, is that they have been deprived of a trial of the issues and charges made in the complaint in the conversion action and put in issue by the Trust Company in that action resulting in the summary taking of their property without due process of law.

The answer filed by petitioners to the petition of the Trust Company, putting in issue solely the jurisdiction of the Surrogate's Court was in conformity with settled and proper practice.

Matter of Kelly v. Langevin, 153 App. Div. 322, 323.
Matter of Cary, 77 Misc. 602, 603-604, affirmed 155 App. Div. 946.
Matter of De Pierris, 79 Hun 279.
Matter of Andrews, 172 Misc. 373.
Matter of Kirkman, 143 Misc. 342, 343.
Matter of Hearn, 158 Misc. 371, 372.

The practice is analogous to a demurrer to the jurisdiction of the Court, to avoid, if possible, a lengthy and expensive accounting proceeding. No issue can be raised with reference to the merits of the matters set forth in the petition and account until after the jurisdictional issue is decided. In the event of an adverse decision on the issue of jurisdiction, the items of the account are put in issue by filing objections to the petition and account. The petition and account and objections thereupon constitute the pleadings similar to a complaint and answer and define and limit the issues to the merits of the account.

Matter of Doelger, 254 App. Div. 178, 182, aff'd 279 N. Y. 646.
Rule XI, N. Y. County Surrogates' Rules.

(A copy of the above rule is annexed hereto in the appendix.)

No objections could be filed here for the following reasons:

(1) The settlement of the account was deferred until after the alleged release was declared invalid, hence no objections could be filed until that time (R. 23) and no objections could be filed to the participation because the Trust Company maintained it still held it and a decree cannot adjudicate claims as to undelivered property.

Meredith v. First Trust Co. of Albany, 260 App. Div. 517, 520.
Joseph v. Herzig, 198 N. Y. 456, 461, 463.
Matter of Denbosky, 245 App. Div. 93.

(2) The filing of objections would have been inconsistent with the basic claim that no accounting was necessary, and that the Surrogate's Court had no jurisdiction of the subject-matter, as it would have been an anomaly to set up this basic issue and proceed to a trial of the very issues which these petitioners contended were triable by a jury in the prior action. The simultaneous filing of an answer attacking the jurisdiction and an answer putting in issue the merits of the petition and account filed would have been tantamount to the simultaneous filing of a demurrer to a bill of complaint, and an answer to the merits of the same complaint.

(3) A prior action was pending in which all the issues between the parties were determinable, and which are not determinable in the Surrogate's Court, as the Surrogate ruled (R. 14).

Farmers' Loan & Trust Company v. Lake St. R. D. Co., 177 U. S. 51, 61.
Colson v. Pelgram, 259 N. Y. 370, 374, 375.
Ludwig v. Baumgart, 48 App. Div. 613.

(4) The Surrogate had no jurisdiction to try the issues in the Supreme Court action until the Supreme Court so ordered.

It thus appears that at the time of the hearing the issues in the Supreme Court action could not be tried on that hearing under an attempt to judicially settle the account. No objections had been or could be filed to the account, and hence no items of the account were then in issue. Hence the only issue pending under the answer filed was to the jurisdiction of the Court. Hence this was not a "contested accounting" (R. 263).

Under Section 40, Subdivision 9 of the Surrogate's Court Act and Section 190a of the Civil Practice Act the Surrogate's Court has no jurisdiction to try an action

pending in the Supreme Court until an order is made by the Supreme Court directing such trial which preserves the attendant right to a jury trial.

Matter of Pfersich, 153 Misc. 609.
Matter of Pedrette, 153 Misc. 106.

A Supreme Court action cannot be consolidated with a proceeding in the Surrogate's Court under Section 65 of the Surrogate's Court Act until an order has been made by the Supreme Court transferring the action to the Surrogate's Court, and none was made in this instance.

Matter of Franklin, 153 Misc. 110.

In *Matter of Pfersich,* 153 Misc. 609 (*supra*), the Surrogate, who made the decree here, said at page 610:

> "Where an action is pending in the Supreme Court, transfer may *only* be made under the terms of the new amendments in the discretion of the Supreme Court upon the prior consent of the Surrogate evidenced by his order."

In *Matter of Franklin,* 153 Misc. 110 (*supra*), the Surrogate, referring to the trial of a Supreme Court action in the Surrogate's Court, said:

> "If *thereafter* the Supreme Court shall determine to transfer the action to this court, it will upon such transfer be consolidated with the then pending accounting proceeding."

Referring to an application to try the issues under the pleadings in a Supreme Court jury action upon an accounting proceeding in the Surrogate's Court, made prior to the enactment of Section 40 Subdivision 9 of the Surrogate's Practice Act and Section 190a of the Civil Practice Act in 1934, permitting such trial upon an order made by the Supreme Court, the Surrogate, who

made the decree herein, then said in *Matter of Harkness,* 119 Misc. 361, 362:

> "There is no authority for the trial of the issues in the Surrogate's Court upon the pleadings in another *form*" (*sic*).

He also said:

> "He should proceed with his pending action in that court, if he desires a jury trial."

He concluded that the only method in which the issues in the Supreme Court action should be determined on an accounting was by withdrawing that action and filing a claim *de novo* in the Surrogate's proceeding.

Hence, on the hearing under the answer to dismiss the proceeding for want of jurisdiction, the Surrogate's Court had no jurisdiction to try the issues in the Supreme Court action under the pleadings in that action, or to consolidate and try the issues in the Supreme Court action on that hearing.

When, therefore, on March 28, 1940, the Trust Company served notice "that this proceeding will be brought on for hearing and trial before Mr. Surrogate Foley at a Term of this Court to be held * * * on April 12, 1940 * * *" (R. 271), the only issues triable were those set forth in the answer of these petitioners. However, the issue to be tried is governed by the pleadings and not by the notice of hearing and under the answer filed was limited to the allegations set forth in the answer attacking the jurisdiction.

Pepper v. Litton, 308 U. S. 295, 303.
Wright v. Delafield, 25 N. Y. 266, 270.

The Surrogate, therefore, in deciding all the issues in the Supreme Court action, and making a decree thereon without jurisdiction, without notice, and without af-

fording an opportunity to petitioners to be heard, and without pleadings raising those issues in the Surrogate's Court, stripped the petitioners of their property without due process of law.

Chisholm v. Gilmer, 299 U. S. 99, 102.

The decree and decision must be construed with reference to the issues it was meant to decide.

Vicksburg v. Henson, 231 U. S. 259, 269.

The following allegations of the complaint in the Supreme Court action were adjudicated on the hearing to dismiss, in the absence of any pleadings.

1. The mortgage participation involved was really a fourth mortgage and made a first mortgage by consolidation of three prior mortgages under the guidance of the Trust Company, which investment was made without any appraisal or investigation, and was not a proper investment (R. 130, 223-226).

The Surrogate found and adjudged that all investments had been properly and suitably made and administered to June 8, 1936, and paid to the remainderman and to the executor of the life tenant (R. 12, 268).

Not only were the said petitioners deprived of their constitutional right to submit their evidence on this issue, and not only was the finding made in the absence of any pleadings upon which to base the adjudication, but the Trust Company produced no evidence in support of the finding. It was made in the absence of any evidence whatever. The said petitioners involved in that action were deprived of the right to submit evidence on a proper trial including that of real estate experts showing the value of the property at the time the participation was allocated to the trust, and that no appraisal was made at that time.

2. The representations made by the Trust Company with relation to the investment (R. 130, 227, 131, 259-260).

The Surrogate found that the accounting and delivery of the document of May 26, 1936 were made without any representation as alleged in the complaint and bill of particulars in the Supreme Court action and on the hearing prejudged this issue (R. 12, 109-110).

There is no evidence whatever in the record to sustain this finding. The petitioners involved were bereft of the right to submit their evidence upon this issue, both under the allegations of the complaint and under the allegations of the bill of particulars (R. 131, 259-260).

3. The unlawful reduction of interest and the complaint made thereon prior to June 8, 1936 (R. 130, 227, 229-230).

By three findings said petitioners have unconstitutionally been deprived of the right to try this issue: (a) the account is judicially settled (R. 11); (b) the propriety of the administration of all investments is adjudged (R. 12); (c) the Trustee's duties have been fully performed, and it has fully accounted for its acts, and proceeding to June 8, 1936 (R. 13). The petitioners have been deprived of their right to submit their evidence on this issue upon a proper trial, and under proper pleadings. In fact, the findings are contrary to the Court's opinion (264), and the evidence produced upon the hearing (182, 101, 185).

4. The condition precedent upon which the document of May 26th was signed, and the breach thereof after refusal of any agency to the Trust Company by the remainderman of the participation involved (R. 130, 226-228).

The Court found the alleged release binding and conclusive to June 8th 1936 when the remainderman receipted for the securities and that she agreed to accept the certificate of the participation of the bond and mort-

gage, and that her sworn statements in the complaint in the Supreme Court action that the document of May 26, 1936 was conditionally delivered (R. 228) and admitted by answer of the Trust Company in that action (R. 235) were fictitious (R. 7-8, 11-12, 267).

Not only is this determination without the scope of the pleadings presented for hearing, but it is contrary to the documentary evidence of the Trust Company.

The Trust Company in its answer after alleging that the release was conditionally delivered, adds that the conditions were thereafter dispensed with (R. 130, 235). No evidence that these conditions were dispensed with was adduced by the Trust Company. There is but merely a receipt by the remainderman acknowledging delivery of whatever documents the Trust Company had sent (R. 103, 163). The remainderman, however, had no opportunity to present her evidence regarding the circumstances under which this receipt was signed, and to explain it.

On its motion for a bill of particulars the Trust Company again admits that the receipt and release was conditionally delivered (R. 131, 251). It was specifically shown in the following letters submitted in evidence by the Trust Company: May 27, 1936 (R. 101, 154-155), June 3, 1936, July 13, 1938, July 20, 1938 and August 23, 1938 (103, 158, 106, 173, 178, 107, 182). It was also admitted by the Trust Company upon the trial (R. 101). However petitioners involved were unconstitutionally barred from submitting the entire evidence on this issue on a proper trial under proper pleadings.

5. The rejection of the certificate of participation, and the negotiations for payment to excuse the delay in beginning suit (R. 130, 229).

This allegation is disposed of by the finding that all the objections of the petitioners are overruled, although none were or could be filed (R. 13), and by the further finding that the receipt of June 8, 1936 discharged the Trust Company from all liability and constituted an acceptance of the certificate (R. 13, 266). The Trust Company itself submitted a letter showing that the certificate had been rejected from the time of its delivery (R. 105, 170-171).

6. Disposing of the issues of the defense of release and account stated, set up in the answer in the Supreme Court action, the Court finds that the remainderman is barred by the document of May 26, 1936, and it is binding upon all the petitioners because by the receipt of June 8, 1936 the remainderman agreed to accept the certificate of participation delivered, and that this decree is conclusive as to the validity of that document to June 8, 1936 (R. 7-8, 11-12, 13-14). These findings are based upon the opinion of the Surrogate rendered without jurisdiction or pleadings or proper evidence and depriving petitioners of a trial. The Surrogate announces that the facts are identical with cases enumerated by him (R. 263). On the Trust Company's evidence they are not, because in those cases complaint was made that the signer of the release did not understand the purport of it. Here, as shown by the bill of particulars, the remainderman made emphatic objections to the participation, and was lulled into silence by the representations of the Trust Company, and by the agreement of the Trust Company to deliver to her an absolute assignment, to which she was entitled (258-260). The Surrogate adds that the remainderman had the benefit of counsel (263-264). The record shows the remainderman had counsel but four days before the document of May 26, 1936 was signed (99-100, 133).

It therefore follows from a review of these findings that they are all made contrary to the pleadings under which the hearing was had, and purported to try the issues in another action without due process of law, resulting in the deprivation of the petitioners involved in that suit of their property.

In *Coe v. Armour Fertilizer Works,* 237 U. S. 413 *(supra),* an execution was issued against the property of the plaintiff in error, pursuant to a Florida statute, without pleadings and without trial on the ground that he was a stockholder whose stock was not paid for, and an execution against the corporation had been returned unsatisfied. This Court said at p. 419:

> "It would seem plain that any course of procedure having for its object the taking of property to satisfy an alleged legal obligation, and which yet accorded no hearing to a respectful protest invoking on reasonable grounds a prohibition found in the supreme law of the land, could itself hardly be termed 'due process of law.'"

The Court further said at p. 426:

> "For in this case there was no pending action or issue; plaintiff in error came into court to object, on jurisdictional grounds, to the execution of final process upon his property. And the effect of the decision under review was to convert his petition, which simply raised an issue of law under the state constitution and the Fourteenth Amendment into a tender of an issue of fact respecting his status as a stockholder and the amount of his unpaid subscription, if any, and then to hold him concluded upon the latter issue for failure to introduce evidence bearing upon it. In doing this, the court in effect rendered judgment against him upon a matter that was not within the pleadings and was not in fact litigated. To do this, without his consent—and the record shows no consent—is contrary to fundamental principles of justice. *Reynolds v. Stockton,* 140 U. S. 254, 268, 269."

The ruling is particularly applicable here. The petitioners here came into court to object on jurisdictional ground to the Surrogate's proceeding. The effect of the decision under review here was to convert the petitioner's answer here, which simply raised an issue of law, into a tender of an issue of fact relating to all the issues in the Supreme Court action which were not at issue in this proceeding, and to hold these petitioners concluded by these findings. In so doing here the Surrogate in effect rendered judgment upon a matter that was not within the pleadings, and which was not in fact litigated. To do this is contrary to fundamental principles of justice.

In *Reynolds v. Stockton,* 140 U. S. 254 (*supra*), cited in the above authority, a judgment had been made contrary to the allegations set forth in the pleadings. This Court, in its opening sentence there, said at p. 264:

> "We are of opinion that the decision of the Chancery Court of New Jersey, as sustained by the Court of Errors and Appeals of that State, is correct, and must be affirmed. The first and obvious reason is that the judgment of the Supreme Court of New York was not responsive to the issues presented."

The Court further said at p. 265:

> "Take an extreme case: Given a court of general jurisdiction, over actions in ejectment as well as those in replevin; a complaint in replevin for the possession of certain specific property, personal service upon the defendant, appearance and answer denying title; could (there being no subsequent appearance of the defendant and no amendment of the complaint) a judgment thereafter rendered in such action for the recovery of the possession of certain real estate be upheld? Surely not; even in the courts of the same State. If not there, the constitutional provision quoted gives no greater force to the same record in another State."

The ruling is applicable here. On an issue to the jurisdiction of the Court, findings are made in an action for conversion. The Court made the following pertinent ruling, which is applicable here (p. 265):

> "The invalidity of the judgment depends upon the fact that it is in no manner responsive to the issues tendered by the pleadings. This idea underlies all litigation. Its emphatic language is, that a judgment, to be conclusive upon the parties to the litigation, must be responsive to the matters controverted."

The Court in its summary fully sustains petitioner's violated constitutional rights here asserted saying (p. 268):

> "Jurisdiction may be defined to be the right to adjudicate concerning the subject-matter in the given case. To constitute this there are three essentials: First, the court must have cognizance of the class of cases to which the one to be adjudged belongs; second, the proper parties must be present; and third, the point decided must be, in substance and effect, within the issue. That a court cannot go out of its appointed sphere, and that its action is void with respect to persons who are strangers to its proceedings, are propositions established by a multitude of authorities. A defect in a judgment arising from the fact that the matter decided was not embraced within the issue has not, it would seem, received much judicial consideration. And yet I cannot doubt that, upon general principles, such a defect must avoid a judgment. It is impossible to concede that because A and B are parties to a suit, a court can decide any matter in which they are interested, whether such matter be involved in the pending litigation or not. Persons by becoming suitors do not place themselves for all purposes under the control of the court, and it is only over these particular interests, which they choose to draw in

> question, that a power of judicial decision arises.' And again: 'A judgment upon a matter outside of the issue must, of necessity, be altogether arbitrary and unjust, as it concludes a point upon which the parties have not been heard. And it is upon this very ground that the parties have been heard, or have had the opportunity of a hearing, that the law gives so conclusive an effect to matters adjudicated * * *.'"

In *Standard Oil Company v. Missouri,* 224 U. S. 270 (*supra*), this Court held that even assuming the Surrogate here had jurisdiction over the subject matter of the proceeding, he could make no decision beyond the scope of the pleadings. The Court said at pages 281-282:

> "For even if a court has original general jurisdiction, criminal and civil, at law and in equity, it cannot enter a judgment which is beyond the claim asserted, or which, in its essential character, is not responsive to the cause of action on which the proceeding was based."

Quoting from *Windsor v. McVeigh,* 93 U. S. 274, 282, the Court continued:

> "Though the court may possess jurisdiction of a cause, of the subject matter, and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by the law. If, for instance, the action be upon a money demand, the court, notwithstanding its complete jurisdiction over the subject and parties, has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for a libel or personal tort, the court cannot order in the case a specific performance of a contract. If the action be for the possession of real property, the court is powerless to admit in the case the probate of a will * * *. The judgments mentioned, given in the cases supposed, would not be merely

> erroneous: they would be absolutely void; because the court in rendering them would transcend the limits of its authority in those cases.' *Windsor v. McVeigh,* 93 U. S. 274, 282. See also *Reynolds v. Stockton,* 140 U. S. 254, 265-268; *Barnes v. Railway,* 122 U. S. 1, 14."

The Court would undoubtedly have added if the question was presented that when a pleading is addressed solely to the jurisdiction of the Court demanding a dismissal of the proceedings on the facts pleaded that a Surrogate cannot try all the issues in a conversion action pending in another Court under the pleadings in that action.

In re *Conservative Mortgage & Guaranty Co.,* 24 Fed. (2nd) 38 (*supra*), the Sixth Circuit Court of Appeals again assuming that the Court had jurisdiction held that it must make a decree or judgment solely within the confines of the pleadings, and said at p. 41:

> "Assuming, for the purposes of this opinion, that the municipal court might, were its powers duly invoked, exercise all the powers of a court of common pleas in respect to a general creditors' bill for the administration of a judgment debtor's estate, yet the question whether jurisdiction other than in aid of the judgment creditor's execution existed, must be determined by the pleadings therein. Mere possession of such power is not of consequence, unless the power is properly invoked; not by the court on its own motion, but by some act of the suitor concerned, and in some mode recognized by law. Freeman on Judgments, § 338. 'In the absence of statute to the contrary, it is a general rule that the relief to be awarded by a judgment is limited to that sought by the pleadings, or incidental to such relief. * * * The right to recover depends not upon the prayer, but upon the scope of the pleadings and the issues made or which might have been made under them. A

> material variance between the relief sought and that awarded is fatal to the judgment * * *' 33 Corp. Jur. p. 1144, §88; *Id.* p. 1072, §34; *Standard Oil Co. v. Missouri,* 224 U. S. 270, 32 S. Ct. 406, 56 L. Ed. 760, Ann. Cas. 1913D, 936."

In *U. S. v. Goldstein,* 271 Fed. 838, 845 (*supra*), the Eighth Circuit Court of Appeals said:

> "A judgment upon a matter not within the pleadings and not litigated is void, being contrary to fundamental principles of justice. *Reynolds v. Stockton,* 140 U. S. 254, 11 Supp. Ct. 773, 35 L. Ed. 464; *Coe v. Armour Fertilizer Works,* 237 U. S. 413, 426, 35 Sup. Ct. 625, 59 L. Ed. 1027. 'A decree has to be founded on the *allegata* as well as *probata* of the case.' *Putnam v. Day,* 89 U. S. (22 Wall.) 60, 66 (22 L. Ed. 764); *Hendryx v. Perkins,* 114 Fed. 801, 806, 52 C. C. A. 435."

Here the decree was neither *secundum allegata neque probata.*

The decision is applicable to petitioner, J. V. Z. Anthony. The Court there held that findings of fact against persons not parties to the action wherein they were made are void. Here after the hearing the Surrogate made findings against this petitioner on issues in an action in which he was not a party.

It therefore follows that this decree made without jurisdiction under the pleadings in another action in another court on a hearing addressed solely to the jurisdiction of the Court and wholly outside of the issues framed by the answer filed is void and that these petitioners have been unconstitutionally deprived of their property under the due process of law provision of the United States Constitution.

II.

The petitioners involved were deprived of any trial of the issues framed by the pleadings in the Supreme Court action and without notice were deprived of their property, contrary to the due process of law provision of the Constitution of the United States.

Frank v. Mangum, 237 U. S. 309, 326.
Palko v. Connecticut, 302 U. S. 319, 327.
Ohio Tel. Co. v. Commission, 301 U. S. 292, 304-305.
Truax v. Corrigan, 257 U. S. 312, 332.
Sanders v. Shaw, 244 U. S. 317.
Georgia Ry. & El. Co. v. Decatur, 295 U. S. 165, 171.
Jensen v. Union Pac. Ry. Co., 6 Utah 253 (4 L. R. A. 724).
Windsor v. McVeigh, 93 U. S. 274, 277.
Stuart v. Palmer, 74 N. Y. 183, 191.

The Surrogate summarily directed that the issues of the conversion action be presented by petitioners on that hearing (R. 110, 130-131), and proceeded to receive the *ex parte* evidence of the Trust Company without notice and without pleadings (R. 110, 130-131).

The command of the Surrogate to petitioners to proceed with the trial of the issues in the conversion action did not involve discretion. It did not involve local practice or procedure. It involved the inalienable right to a trial including the right to submit evidence of the issues involved in the conversion action under the fundamental law of the land. The petitioners could not, if they would, have produced their evidence instanter on that hearing, when it justifiably came prepared to and did try the issues under the answer filed in a court that had no jurisdiction under the law, and the pleadings to determine any other issue.

Orderly procedure and justice demanded assuming the Surrogate had jurisdiction notice and an opportunity to be heard, prior to the attempted trial of the Supreme Court issues. No notice was given that the application to dismiss on the ground that a prior action was pending, and the trial of the issues of the Supreme Court action would be heard and decided simultaneously (R. 268-269, 264, 266, 267), and on the express direction of the Court the appellants were deprived of any notice. No notice was given that a jury trial to which the parties involved in the action were entitled under the positive law of the State would be denied (R. 265-266).

Without notice and before he knew the evidence if any to be produced by the petitioners, the Surrogate ruled that petitioner had settled with the Trust Company on June 8, 1936, and that the Trust Company may have a decree settling its account which would be *res adjudicata* "as to all transactions before June 8, 1936" (R. 108-110, 111, 113, 114, 268). The decree later made decides all the issues of the Supreme Court action to June 8, 1936, thus summarily depriving petitioners of a trial on the issues in the Supreme Court action, and of the opportunity to present their evidence and of the right to a jury trial, and which they had previously demanded.

Without a trial and without evidence they were charged with repudiation of their alleged agreement in issue in the prior action (R. 8, 86, 90-91, 94-96, 108, 109-113, 116, 117, 119-121, 130-131, 265).

In *Truax v. Corrigan*, 257 U. S. 312, 302 (*supra*), this Court said:

> "The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears

> before it condemns, which proceeds not arbitrarily or capriciously but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society."

The Surrogate by his direction to the Trust Company to advise the Supreme Court *ex parte*, to decide the motion still pending to transfer the action in the manner directed by him and later ignoring the motion entirely, and consolidating the hearing to dismiss with the issues in a prior action impromptu and after the hearing (267-268) clearly violated the due process provision of the Constitution to these petitioners. The petitioners were thereby deprived of any notice of the trial of the issues of the Supreme Court action, and stripped of the right to submit their evidence. To instantaneously consolidate a conversion action at law on that hearing with the application to dismiss without notice, was an anomaly.

In *Palko v. Connecticut*, 302 U. S. 319, 327 (*supra*), Mr. Justice Cardozo said:

> "The hearing, moreover, must be a real one, not a sham or a pretense. *Moore v. Dempsey*, 261 U. S. 86; *Mooney v. Holohan*, 294 U. S. 103."

In *Ohio Tel. Co. v. Commission*, 301 U. S. 292, 304-305 (*supra*), Mr. Justice Cardozo wrote that the right to a fair hearing "is one of 'the rudiments of fair play' assured to every litigant by the Fourteenth Amendment as a minimum requirement."

In *Jensen v. Union Pacific Ry. Co.*, 6 Utah 253 (4 LRA 724) (*supra*) the Court held that:

Due process of law means "that a party should have his day in court—a trial; which means the right of each party, plaintiff and defendant, to introduce evidence to establish his right to recover on the one hand, and to

establish his defense on the part of the other; after which comes judgment. Any judgment which is rendered without these modes of procedure, or in disregard of them, is not 'due process of law.' Any other procedure condemns before it hears, does not proceed upon inquiry, but renders judgment before trial."

In *Stuart v. Palmer,* 74 N. Y. 183 (*supra*) (cited by this Court in *Coe v. Armour Fertilizer Works,* 237 U. S. 413, 424; *Wuchter v. Pizzutti,* 276 U. S. 13, 24, 25; the Court of Appeals of the State of New York summarizing the definition of due process of law under the Federal Constitution, said at p. 191:

> "It may however be stated generally that due process of law requires an orderly proceeding adapted to the nature of the case in which the citizen has an opportunity to be heard, and to defend, enforce, and protect his rights. A hearing or an opportunity to be heard, is absolutely essential. We cannot conceive of due process of law without this."

A jury trial has been demanded, and hence no consolidation could be made even if an order of transfer had been entered as petitioners involved were entitled to a jury trial separate and apart from any accounting proceeding. There was no account in issue and never could be as all the items of the former trust had been admittedly received except the participation at issue in the Supreme Court.

While a State law may deprive a litigant of a jury trial (*Walker v. Sauvinet,* 92 U. S. 90, 93), a litigant deprived of a jury trial in direct violation of a State law granting such trial as the established mode of procedure is deprived of his rights under the Fourteenth Amendment.

Frank v. Mangum, 237 U. S. 309, 326, *supra.*

It follows from the aggregate of the above recitals that the hearing was not "* * * conducted according to the

settled course of judicial proceedings as established by the law of the State," and that it did not include "notice, and a hearing, or an opportunity to be heard, before a Court of competent jurisdiction, according to established modes of procedure," and hence was not "'due process' in the constitutional sense."

Frank v. Mangum, 237 U. S. 309, 326 (*supra*).

In *Windsor v. McVeigh,* 93 U. S. 274 (*supra*), an answer and claim filed to a proceeding to confiscate the defendant's property were stricken from the file and his property was confiscated. Here the same result was accomplished. The Surrogate, ignoring the issue presented, decided the issues in an action in another court without notice and without jurisdiction, and thereby one quarter of remainderman's inheritance (R. 64) was confiscated.

This Court held that there could be no judgment without a proper trial. The Court approving of the statement by Mr. Justice Swayne, quoted in the opinion, that sanctioning such a procedure would be a blot upon our jurisprudence and civilization, and contrary to the first principles of social compact and of the right administration of justice, said, referring to this quotation (p. 277):

> "The principle stated in this terse language lies at the foundation of all well-ordered systems of jurisprudence. Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal."

and further

> "It is difficult to speak of a decree thus rendered with moderation; it was in fact a mere arbitrary edict, clothed in the form of a judicial sentence."

The notice which a party must receive must be an adequate notice clearly apprising the other party of the issues to be tried and limited to the pleadings.

In *Saunders v. Shaw,* 244 U. S. 317 (*supra*), this Court held that it was a violation of the due process clause of the Constitution to deny a party the right to present his evidence in a state court on one issue on which the plaintiff's evidence was presented, and later ruled inadmissible, and upon which evidence the Appellate Court based its reversal on the ground that the evidence rejected by the Trial Court was admissible. Here petitioners have been deprived the right to submit evidence on all the issues.

In *Georgia Railway Company & El. Co. v. Decatur,* 295 U. S. 165, 171 (*supra*), this Court held that the refusal of a state court to admit in defense of a suit to collect a tax any evidence tending to prove that no benefit resulted on the ground that such evidence was immaterial, amounts to a denial of a hearing on that issue, and violates the due process clause of the Fourteenth Amendment.

That evidence was offered under proper pleadings. Here said petitioners were ordered extempore to produce their evidence under the pleading in another action not in issue under the pleadings on that hearing and made findings without any trial to these petitioners.

Notwithstanding the rulings of the Surrogate on the hearing (R. 97-98, 99-100, 110, 111), petitioners were justified in relying on the premise that the Surrogate would adhere to issues presented in the final decision to

be rendered after the hearing as set forth in the trial memorandum submitted to him.

The Surrogate did not rule at the opening of the hearing that he had jurisdiction and order the parties to proceed (187 N. Y. 101 at 102 [Mem.]). After the opening statements of counsel, he said, "Proceed," presumably with the proof of the issues presented by the pleadings before him (R. 92). It was not until late in the hearing, at first merely by inference from the rulings made (R. 97, 100) that petitioners were apprised that the Surrogate would make a decree "as to all transactions before June 8, 1936" (R. 110-111). Petitioners' attempt to place their objection and position fully upon the record was frustrated by the interruptions of the Surrogate and the Trust Company (R. 101, 110-121). It was not until the decree was made that petitioners knew that a decision of the issues of the Supreme Court action had been incorporated therein.

It could not reasonably be expected when the petitioners came to the hearing to try the only issue set forth in the answer, that they should have anticipated that their Constitutional rights would be violated, and anticipatorily so asserted on the record before the decision was made on April 16, 1940 (173 Misc. 1042), several days after the hearing.

When the petitioners' brief was submitted in the Appellate Division setting forth that the petitioner had been deprived of a trial of the issues in the Supreme Court by the anomalous proceeding taken, the attention of that Court was called to the fact that the motion to transfer the action was still undecided by Mr. Justice Levy, before whom it was pending. It was withdrawn by the Trust Company after petitioners' brief had been served (R. 280-281).

It was not until the case was determined by the Appellate Division that it appeared that petitioners' constitutional rights had been invaded, and the petitioners so argued in the Court of Appeals and set forth at length the argument here presented that they had been unconstitutionally deprived of a trial of the issues in the Supreme Court action without a hearing, and without an opportunity to be heard, and without pleadings in the Surrogate's Court, upon which to base the findings made and without jurisdiction. The claim was reiterated in the reply brief (R. 290-294).

On the motion for reargument the petitioners reiterated that the claims above asserted were made under the due process clause of the Federal Constitution. The motion was made in order to clarify any possible claim of ambiguity of the Constitutional right asserted, in view of the fact that the Court of Appeals overlooked these constitutional claims (R. 290-294). It was remotely possible that the Trust Company may have contended that the New York State Constitution is relied upon. These facts are admitted by the failure of the Trust Company to submit any affidavit to the contrary. On the motion for reargument it disclaimed any such contention. By denial of reargument, the Court of Appeals makes similar disclaimer, otherwise reargument would have been granted, because "some question decisive of the case and duly submitted by counsel has been overlooked by the Court or that the decision is in conflict with a statute or controlling decision, to which the attention of the Court was not drawn through the neglect or inadvertence of counsel."

Fosdick v. Town of Hempstead, 126 N. Y. 651, 652.
People v. Patrick, 183 N. Y. 52, 53.

Hence the petitioners are entitled to a writ of certiorari to the Surrogate's Court of New York, where the mandate

of the Court of Appeals reposes, and the judgment has been entered in that court making the judgment of the Court of Appeals the judgment of the Surrogate's Court (R. 285-287).

Missouri v. Gehner, 281 U. S. 313, 320.

III.

The Trust Company proved that the petitioners involved have a meritorious cause of action, and proved the main facts thereof.

Having shown that the petitioners involved have been deprived of a trial of their cause of action without due process of law, it is unnecessary to prove that said petitioners will succeed on a trial.

Saunders v. Shaw, 244 U. S. 317, 319.
Brinkerhoff-Faris Co. v. Hill, 281 U. S. 673, 681.

Such proof, however, emphasizes the violation of petitioners' constitutional rights. It has been proven to a considerable extent under the preceding points.

Under the document of May 26, 1936, the Trust Company undertook to deliver unencumbered assignments of the participations and the document was delivered on the condition that such assignments would be delivered, both expressed and implied (R. 133-147, 96, 148-149, 101, 153-155). The document, unsigned by the Trust Company and without seal (R. 141), having been delivered before any of the items therein recited as transferred and assigned, were actually transferred and assigned was void when delivered and was without consideration.

Stiebel v. Grosberg, 202 N. Y. 266.

McManus v. Biddison, 152 Misc. 239, 241; affirmed 242 App. Div. 623.
Dambmann v. Schulting, 75 N. Y. 55, 59.

It could not become effective until compliance with the condition under which it was given and the Trust Company had delivered her property unencumbered to the remainderman.

Barnes v. Southfield Beach Co., 202 N. Y. 301.
Hasbrouck v. Van Winkle, 261 App. Div. 679.

In a letter of March 6, 1936 the Trust Company represented the investment as a salutary one (R. 98, 150-151), and two months thereafter wrote the remainderman's father who lived at a different place than the remainderman (R. 98, 150, 103, 159) that the property which it had represented two months before as a paying investment had been operated at a loss for a year, and that it had reduced the rate of interest on the investment on its initiative (R. 98, 152).

The account filed by the Trust Company shows that no appraisal of this property was made in 1936 at the time that it made its representation (R. 66, 169).

The Trust Company delivered a certificate retaining proprietary dominion over her property (R. 123, 202-205). Such delivery, together with the other acts alleged, constituted conversion.

Mendelson v. Boettger, 257 App. Div. 165, 169-170, 171; affirmed 281 N. Y. 747.
Laverty v. Snethen, 68 N. Y. 522, 524.
Malmud v. Blackman, 251 App. Div. 192, 194.
National Surety Company v. Manhattan Mortgage Company, 185 App. Div. 733, 739; affirmed 230 N. Y. 545.
Fisher v. Title Guarantee & Trust Company, 262 App. Div. 293, 296, 299; affirmed 287 N. Y. 275.
Matter of Allen, 142 Misc. 113, 117-120.

Acknowledgment of the receipt of the confiscatory certificate sent is not an assent to the confiscation. A receipt is not a contract, and if it were an agreement to receive less than one is legally entitled to, is void for want of consideration.

Mance v. Hossington, 205 N. Y. 33.
Seeley v. Osborne, 220 N. Y. 416, 421.

The Trust Company having been guilty of conversion, there was no duty on the petitioners to repudiate the receipt and to make any complaint or demand before beginning suit.

MacDonnell v. Buffalo L. T. & S. D. Co., 193 N. Y. 92, 101.
Bostwick v. Burnett, 74 N. Y. 317, 319.
Chandler v. Chapman, 218 App. Div. 773.
Buckingham v. Vincent, 23 App. Div. 238, 240.
Schmid v. Garfield National Bank, 64 Hun 298, 300.
Stickles v. Bernier, 139 Misc. 405, 409.
Also *J. G. White & Co. v. Ball Engineering Co.*, 298 Fed. 709, 713; certiorari denied 265 U. S. 596.

However, she did repudiate the receipt and certificate (R. 105, 170-171), and immediately protested when the interest was reduced (182, 101, 185).

Having agreed to give an assignment of the participation, the Trust Company cannot plead impossibility of performance, or that it was impracticable to give such assignment. However, there is no impossibility of performance, and no impracticability in delivering such an assignment. As a holder of this participation she was a tenant in common with the Trust Company in the mortgage involved.

Matter of Lawyers Title and Guaranty Co., 157 Misc. 516, 519.
Matter of New York Title and Mortgage Co., 160 Misc. 67, 73-74.
Matter of People (Westchester Tit. & T. Co.), 268 N. Y. 432.

The rights and liabilities of tenants in common as to collection of rent, payment of mortgage interest, and the foreclosure thereof are well settled. A tenant in common may have her portion of the rent paid to her directly.

T. G. W. Realties, Inc. v. Long Island Bird Store Inc., 151 Misc. 918, 924.
McAdam, Landlord & Tenant (5 ed.), 1083.

The Trust Company repeatedly and irrevocably admitted that it never gave an assignment of the participation to the petitioner, Helen V. Z. Anthony the remainderman, and is still accountable for it (112, 113-114, 115, 117, 118, 119). Its supplemental account filed conclusively so demonstrates (R. 63-65, 67-68, 70). The document of May 26, 1936, provides that it is made in consideration of the delivery *inter alia* of the participations involved (139-140). Therefore the release is ineffective as to the undelivered participation, because a release like a decree on an accounting is effective only as to items delivered, and is not binding as the assets remaining in its hands.

Meredith v. First Trust Co. of Albany, 260 App. Div. 517 *(supra)*.
Joseph v. Herzig, 198 N. Y. 456, 461-463 *(supra)*.
Matter of Denbosky, 245 App. Div. 93 *(supra)*.

All of which is demonstrated by the evidence of the Trust Company and a few isolated documents submitted by petitioners, offered solely in support of the allegations in their answer, that no accounting was necessary and that the Trust Company purported to act as custodian and not as trustee, and the Court had no jurisdiction in the premises (R. 125). Petitioners have hitherto been deprived of the right to so demonstrate supplemented by their evidence upon any trial.

It follows plainly and conclusively that the petitioners Helen Van Zile Anthony and William D. Smith by the decree made as affirmed by the Court of Appeals of the State of New York, have been forever barred of a trial of the issues framed by the pleading in the Supreme Court action and have been forever stripped and deprived of their property involved in that action without due process of law, as also has petitioner J. V. Z. Anthony by the decree on issues in which he has no interest and was not a party and all the petitioners have been deprived of their property by a punitive decree awarding costs of a contested accounting and an abortive trial of the conversion action, when no accounting proceeding was or could be at issue, without due process of law and by the judgments for costs on affirmance of a void decree.

IV.

The application for a writ of certiorari to the Surrogates' Court, New York County, should be granted.

Respectfully submitted,

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